

DISTRICT OF NEW JERSEY

IN RE: : Case No. 07-11757(KCF)  
: Adv. No. 08-01201(KCF)  
SOLOMON DWEK, et al., : Trenton, New Jersey  
: November 29, 2011  
Debtors : 2:14 P.M.

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CHARLES A. STANZIALE, JR., :  
CHAPTER 11 TRUSTEE FOR THE :  
ESTATES OF SOLOMON DWEK, :  
et al., :

Plaintiff, :

VS. :  
:

BEAR STEARNS, INC., KENNETH :  
CAYRE, KLCC INVESTMENTS, LLC, :  
AND KLC FOUNDATION AND D AND D :  
TRUST, :

Defendants. :

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE KATHRYN C. FERGUSON  
UNITED STATES BANKRUPTCY JUDGE

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Plaintiff

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For the Defendants:  
Cayre

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Colloquy

3

1 THE COURT: Come on forward in Stanziale v  
2 Bear Sterns.

3 Good afternoon, Counsel. May I have your  
4 appearances please.

5 MR. PINKSTON: Good afternoon, Your Honor.  
6 Ryan Pinkston, Seyforth Shaw, on behalf of  
7 the Cayre Defendants.

8 THE COURT: I'm sorry. I didn't catch your  
9 name.

10 MR. PINKSTON: Ryan Pinkston.

11 MR. BARREIRO: Darren Barreiro from Greenbaum  
12 Rowe.

13 Mr. Pinkston is here under a pro hac.

14 MR. FINGER: Good afternoon, Your Honor.

15 Kevin Finger of Greenberg Traurig along with  
16 my colleagues, Diane Vuocolo and David DeVito, on  
17 behalf of Plaintiff, Mr. Stanziale.

18 THE COURT: Anybody else? Okay. Thank you.

19 This is a motion to -- well, the only one  
20 that's contested is the motion to compel discovery  
21 responses. Anything to say about the motion to compel  
22 compliance with the subpoena or the motion for leave to  
23 conduct depositions? Anybody have any comment on any  
24 of that?

25 MR. BARREIRO: I guess the only issue on, on

Colloquy

4

1 the motion to actually have the deposition happen, we  
2 asked for it to happen here in, in the courthouse.

3 THE COURT: Right.

4 MR. BARREIRO: I think that would be more  
5 convenient for all counsel and I put that in the order.  
6 If Your Honor doesn't think that's appropriate we can  
7 always go down to the penitentiary, but. . .

8 THE COURT: Actually, I got an ex parte --  
9 it's not here. I don't know why. I got an ex parte  
10 letter from Mr. Dwek who says somehow that he's not  
11 represented, which is not my understanding, but that  
12 for security reasons he wants the deposition conducted  
13 in Philadelphia. Does anybody care about that?

14 MALE VOICE: We'd agree with that, Your  
15 Honor.

16 MR. BARREIRO: We'll go down there.

17 THE COURT: Okay. All right. I don't  
18 remember what the order says. Does the order  
19 specifically say in the courthouse in Trenton or?

20 MR. BARREIRO: Mine said that he'll be  
21 produced here in Trenton so --

22 THE COURT: If you could, if you could send  
23 in another order that says that he should be produced,  
24 and you can make arrangements with the marshals to have  
25 the depositions conducted I think in the courthouse in

Colloquy/Decision/Motion - Finger

5

1 Philadelphia.

2 MR. BARREIRO: In Philadelphia, okay.

3 THE COURT: Okay. And the motion to compel  
4 compliance with the subpoena I'm prepared to just grant  
5 that unless anybody?

6 MR. BARREIRO: No, that's, that's fine, Your  
7 Honor. Thank you.

8 THE COURT: Okay. Great.

9 All right. On the motion to compel discovery  
10 responses, I have on the Cayre entities' papers that  
11 were filed on November 8th, Mr. Stanziale's  
12 certification in opposition filed on November 22nd and  
13 the Cayre Defendants' reply filed on November 25th.

14 I guess since the Trustee was the last, no,  
15 the Cayre Defendants were the last to respond. Why  
16 don't you take it from, why don't you take it from  
17 there, Mr. Finger.

18 MR. FINGER: I'm sorry, Judge?

19 THE COURT: You can pick up the argument that  
20 was left off in the papers. The last papers that I  
21 have on this motion were filed by the Cayre Defendants.

22 MR. FINGER: Yes, it's, they filed a reply.  
23 It's their motion, Your Honor. And the reply doesn't  
24 really say anything different than what's in the  
25 original motion for, to compel. There are two basic

**Motion - Finger**

6

1 issues or two dividing lines. One pertains to a, to  
2 discovery sought on, on pre-petition activities, the  
3 actual transfers at issue here versus post petition  
4 activities of the Trustee. And with respect to the,  
5 the sole item that is pre-petition that has to do with  
6 the transfers. It has to do, that request has to do  
7 with the Kenneth Cayre's status as an insider.

8 The Trustee has responded with very lengthy  
9 responses and record citations in both the R.33 and  
10 R.34 requests and it's, it's just to summarize, the  
11 Defendants don't think that's sufficient, or doesn't,  
12 it's not sufficient, in their view, to establish that.  
13 The proper procedural mechanism, if that's their view,  
14 is to file a motion for partial summary judgment on  
15 that issue, which they've already done and withdrawn.

16 So the Trustee's position is we've answered  
17 that as, as, in a very fulsome way and stand on those  
18 answers.

19 THE COURT: Okay.

20 MR. FINGER: With respect to the post  
21 petition activity, it's important to, to view the  
22 situation from, you know, in the totality of the  
23 circumstances. Mr. Stanziale was appointed as trustee  
24 for 81 different debtors, 80 of which are entities.  
25 And for those post petition activities Mr. Stanziale

**Motion - Finger**

7

1 has the obligation to investigate all potential causes  
2 of action on behalf of, of the estates and bring them  
3 accordingly. To date he has done significant activity  
4 to bring dollars into the estate. This adversary  
5 proceeding is simply one of the causes of action  
6 initiated by Mr. Stanziale in his role as trustee.  
7 The, so the, what, this set of discovery requests have  
8 absolutely nothing to do with the transfers at issue,  
9 and, and to that end the Trustee has produced all  
10 documents that it has.

11 In order to do these, to do his job, Mr.  
12 Stanziale has, has, had to do a few things. One is  
13 there's one human being who, who, who has knowledge  
14 regarding the 80 entities that are debtors in this  
15 case, and that's Mr. Dwek, who has, has indeed provided  
16 information to Mr. Stanziale and his counsel for not  
17 only this cause of action but everything else that the  
18 Trustee has done.

19 In addition, prior to the bankruptcy  
20 petitions being filed, the FDA, FBI raided several  
21 facilities and, and confiscated all the documents and  
22 the Trustee has gone to the FBI data base, they've made  
23 it available to him, and, and pulled out the documents  
24 that relate to the duties that he has been charged by  
25 this Court to discharge. To the extent that those

**Motion - Finger**

8

1 documents relate in any way to this adversary  
2 proceeding, they've been obtained by the Trustee from  
3 the FBI and turned over. So as part of, of the  
4 Trustee's duties in dealing with Mr. Dwek, who has the  
5 knowledge, he's also had some tangential interaction  
6 with the U.S. Attorney's office and the FBI largely  
7 through ministerial types of things. Doesn't have any  
8 FBI memorandum of interview for example. It doesn't  
9 have any recordings that were made by the FBI, that  
10 sort of thing. So against the Defendants' motion to  
11 compel that is how the Trustee has gotten his  
12 information.

13 The Trustee has, has, maintains the privilege  
14 of the Debtors that were pre-petition, but also has a  
15 privilege post petition regarding his investigation of  
16 all the causes of actions that, that are necessary in  
17 order to administer the estate including this one. In  
18 this way it's very similar to the Worldwide case that  
19 comes from the District of South Carolina, Bankruptcy  
20 Court in the District of South Carolina, because in  
21 that case the former manager, for lack of a better  
22 term, of the Debtors was, there were communications  
23 between the Trustee and, and her counsel in order to  
24 formulate causes of action.

25 In a very similar way, the Trustee and his



## Motion - Finger

9

1 counsel in this case communicated with Mr. Dwek, who is  
2 a former agent of the Debtors, but of those 80 debtor  
3 entities Mr. Dwek was the person who had the personal  
4 knowledge and was among the people that the Trustee  
5 dealt with. In, in that context, just as it was in  
6 Worldwide, a privilege, a privilege applies.

7 THE COURT: Well without reference to  
8 Worldwide because I've read that case, what is it that  
9 makes Mr. Dwek more than a really important witness?  
10 What converts him into a client worthy of the attorney/  
11 client privilege or in need of it?

12 MR. FINGER: Well, what Worldwide does is it  
13 applies --

14 THE COURT: I asked you not reference  
15 Worldwide.

16 MR. FINGER: I understand. Okay.

17 There are, there are several precedents  
18 established by the Supreme Court that govern this. It  
19 includes the Weintraub case, the Upjohn case, Hickman  
20 case. All of these cases promulgated by the Supreme  
21 Court establish an attorney/client privilege on behalf  
22 of the corporation and then in those cases discuss the  
23 realities of dealing with a corporation. It's an  
24 inanimate object.

25 So in this case what, what there is is,

**Motion - Finger****10**

1       there's a former agent, that's Mr. Dwek, who represents  
2       those 80 entities, and that is the person that the  
3       Trustee and his counsel communicated with in order to  
4       gather the facts in this case, and that is the basis on  
5       which the privilege is claimed. So yes, Mr. Dwek is  
6       also an important witness, but he's also the  
7       representative of those debtor entities, and that's  
8       where the privilege is established, and it's nothing  
9       more than an application of established Supreme Court  
10      precedent about those privileges.

11               THE COURT: Okay.

12              MR. FINGER: The other, there are a number of  
13      items that, that, that Defendants ask for and many of  
14      them have to deal with communications between Mr. Dwek  
15      and, and the Trustee and his counsel. The vast  
16      overwhelming majority of those communications have  
17      nothing to do with this adversary proceeding. They,  
18      they have to do with the administration of all the  
19      other entities that are the subject of these bankruptcy  
20      estates. Those that do though are subject to that  
21      claim of privilege, but most of them are, are not  
22      relevant to this case.

23              Another, another example is a request for all  
24      recordings that were made. Well, there are 81 Section  
25      341 meetings in which recordings were made. Those

**Motion - Finger/Response - Pinkston****11**

1 don't have anything to do with this adversary  
2 proceeding. So that's another example of the  
3 overbreadth of those requests.

4 There are also requests that have to do, to  
5 deal with payments that were made to Mr. Dwek and those  
6 were made pursuant to an order by this Court and the  
7 proper method to challenge that is, is by R.60 or some  
8 other established rule of procedure that addresses  
9 those types of issues that are already subject to a  
10 court order. It's not in the context of this adversary  
11 proceeding and, moreover, nothing about those payments  
12 has anything to do with this adversary proceeding.

13 THE COURT: Thank you.

14 MR. FINGER: Any questions from the Court  
15 that I may address?

16 THE COURT: Not right now. Thank you.

17 MR. FINGER: Thank you.

18 THE COURT: Mr. Pinkston.

19 MR. PINKSTON: Thank you, Your Honor.

20 I have a lot to say and I'll, I'll try not to  
21 repeat what's in the papers.

22 I'll pick up on Mr. Finger's last point  
23 first. As far as with relevance in this proceeding,  
24 first of all, it's beyond the Trustee's province to  
25 decide what's relevant to a trial of these issues, and

**Response - Pinkston****12**

1 even beyond that point credibility, as the authorities  
2 set out in our reply, make clear it is always relevant.  
3 And I don't, I don't know how otherwise to respond to a  
4 statement that a witness being paid over \$1 million by  
5 the Plaintiffs in this action is not relevant to an  
6 issue of credibility, both to the Trustees credibility  
7 and to Mr. Dwek's credibility.

8 The fact that those payments were made  
9 subject to this Court's order and that the Court  
10 authorized those payments to be made says nothing about  
11 the nature of the expense reimbursement; the types of  
12 charges and receipts that Mr. Dwek was submitting; the  
13 Trustee's due diligence in review of those receipts;  
14 his decision to compensate Mr. Dwek for those. Your  
15 Honor already found earlier in the bankruptcy case that  
16 some of those payments shouldn't have been made, to the  
17 tune of \$150,000. We're entitled to investigate those  
18 payments and the Trustee's review of those receipts and  
19 the types of charges that Mr. Dwek was submitting.  
20 He's a confessed liar and a confessed thief who we  
21 believe has parlayed this bankruptcy case into a  
22 perpetual income stream.

23 Those are facts that the jury is entitled to  
24 hear and that we're entitled to present to a jury. So  
25 we're, we're not seeking to vacate your compensation.

## Response - Pinkston

13

1 So R.60, R.59 really have nothing to do with this  
2 inquiry. This goes to the heart of the Trustee's sole  
3 witness in this proceeding. We, we don't doubt that  
4 the Trustee needed to communicate with Mr. Dwek to do  
5 his job, but to do our job we're entitled to  
6 investigate those communications. He's not, he's not  
7 Mr. Stanziale's client. He's not Mr. Voucolo's client.  
8 And this case is, is vastly different from the  
9 Worldwide Lumber case.

10 In that instance you have a manager of a  
11 corporate debtor who is speaking to Trustee's counsel  
12 not the Trustee, and the Court basically makes the  
13 finding that, that as a co, as co under Weintraub by  
14 which the Trustee succeeds to management of the Debtor,  
15 Mr. Stadelman in that case is essentially a co-manager.  
16 And so if the Trustee's communication with this counsel  
17 are privileged why wouldn't Stadelman's communications  
18 be privileged.

19 That's not the case here, Your Honor, for,  
20 for a couple reasons. In Worldwide Lumber you had a  
21 legitimate corporate entity. Here, all of the  
22 corporate entities were a sham. They were set up to  
23 perpetuate Mr. Dwek's fraud. The Court already made a  
24 finding on that issue when they substantively, when,  
25 when Your Honor substantively consolidated the estates.

**Response - Pinkston****14**

1 They are Mr. Dwek's alter egos. That's a prerequisite  
2 to finding substantive consolidation. So we don't have  
3 the corporate debtor here.

4 We don't have, we don't have the situation  
5 that we had in Worldwide Lumber. And more importantly,  
6 Weintraub, Upjohn and Hickman do not stand for the  
7 proposition that the Trustee's communications with the  
8 Debtor are privileged. What they say is, "A trustee  
9 succeeds to the debtor's privilege for pre-petition  
10 communications."

11 I'm sure as the Court knows, Mr. Stanziale  
12 can waive Mr. Dwek's -- or maybe not Mr. Dwek's  
13 privilege, a trustee can waive a legitimate corporate  
14 debtor's privilege if he needs to in the investigation  
15 and prosecution of avoidance claims and things of that  
16 nature. And the whole basis for that rule is to  
17 prevent corporate from, officers of a corporation from  
18 using attorney/client privilege to shield their pre-  
19 petition illegal activity. That's the whole basis of,  
20 of the doctrine. So the trustee stands in the shoes of  
21 the debtor and can waive that privilege to pursue those  
22 types of claims.

23 Here, we're not seeking pre-petition  
24 communications between Mr. Dwek and his counsel. We're  
25 entitled to know what evidence the Trustee held on the

**Response - Pinkston****15**

1 date he filed the complaint and what he's compiled  
2 thereafter. And those documents and those  
3 communications between the Trustee and his counsel on  
4 the one hand and Mr. Dwek and Mr. Dwek's professionals  
5 on the other hand are undoubtedly relevant and  
6 undoubtedly not privileged.

7 There cannot be an attorney/client privilege  
8 here. The bankruptcy code forbids it. Mr. Stanziale  
9 has to be a disinterested person in order to be  
10 employed, to be appointed as a trustee. The U.S.  
11 Trustee appointed him under that provision. I believe  
12 it's Section 1104 of the bankruptcy code. Ms. Voucolo  
13 and her, her counsel, and her colleagues have the same  
14 obligation to be a disinterested person.

15 So we, we have a lengthy bankruptcy case here  
16 that's gone on for a number of years where the  
17 Trustee's representing to the world that he's  
18 disinterested and he's performing his duties under that  
19 guise and now he comes forward and says, "I'm not  
20 actually disinterested because this is my client. Now,  
21 I have a privilege." He changes, he changes his, he  
22 changes his, his approach when it suits him. And  
23 that's not, that's not a legitimate basis for finding  
24 attorney/client privilege.

25 You know, and a finding like that from Your

**Response - Pinkston**

16

1 Honor will have implications for, for future cases.  
2 You'll have every trustee that stands before Your Honor  
3 claiming that their communications with the Debtor are  
4 privileged. And there's, there's simply no basis in  
5 the law for it.

6 I'd like to address the insider issue, if I  
7 can. The, the fact that we are unsatisfied with the  
8 Trustee's evidentiary basis for his, his insider claims  
9 at this point is a legitimate basis for summary  
10 judgment. And we filed a motion for partial summary  
11 judgment on the issue and the Trustee opposed it with  
12 two statements. First, the Trustee told us that he  
13 needed discovery in order to investigate the claims  
14 further. And second, for the first time, Mr. Dwek  
15 comes forward and submits an affidavit to the Court  
16 accusing our clients of money laundering, for the first  
17 time. That's two years after the case started. No one  
18 had heard of this money laundering accusation until  
19 mid-October of 2010.

20 The, the timing is suspicious. It comes  
21 shortly after we file a motion to limit discovery and,  
22 and Mr. Dwek catches wind of our pleading. You know,  
23 maybe in a communication between Mr. Dwek and the  
24 Trustee, and then all of a sudden there's an affidavit  
25 and, and gratuitous testimony in a proceeding before



## Response - Pinkston

17

1 Judge Linares of the district court about how, how  
2 there was this scheme between Mr. Rosenberg, Mr. Geary  
3 and Mr. Dwek many years before any of these pre-  
4 petition transfers took place about money laundering.

5 Mr. Rosenberg has come forward and said he  
6 doesn't know Mr. Geary. He's never met or spoken with  
7 him. He was here last week and told you, by counsel  
8 told Your Honor that. And Your Honor's, Your Honor's  
9 made a finding in your opinion cited in our brief,  
10 Stanziale v Levi, that Mr. Dwek signed an, or verified  
11 a complaint and then virtually negated every single one  
12 of those verified allegations in deposition testimony.

13 So we, we think we're entitled to that  
14 discovery about the origin of that affidavit, who  
15 drafted it, the communications that went on around its  
16 drafting, and the provenance of that document, and to  
17 test those allegations. It's, it's beyond me to think  
18 that that's, that Mr. Dwek's credibility in a case like  
19 this where we have a down investor who invested, who  
20 lost \$9 million and is being pursued by the Trustee as  
21 if he received \$30 million. We think we're entitled to  
22 that investigation.

23 And let me say also while I'm on this topic,  
24 this is not a situation where Mr. Cayre received \$30  
25 million. He received a payment. He invested more. He

**Response - Pinkston****18**

1 received a payment. He reinvested the principal. This  
2 is not the \$30 million honeypot that the Trustee  
3 portrays it to be.

4 There are a lot of, lot of other issues that  
5 are going to be relevant at trial, Your Honor. When  
6 Mr. Dwek was arrested for car theft in Maryland and  
7 remanded, when his bail was revoked and he was remanded  
8 to custody, the Trustee sent a letter to Judge Linares  
9 on his behalf. The letter wasn't made of record.  
10 We've been unable to obtain it from, from Judge  
11 Linares. But the Trustee conspicuously hasn't provided  
12 it. It's, it's undoubtedly relevant to the Trustee's  
13 and Mr. Dwek's credibility.

14 Additionally, after Mr. Dwek was arrested, we  
15 have reason to believe that the Trustee's, the Trustee  
16 and his colleagues at McCarter & English were calling  
17 around trying to find criminal counsel to represent  
18 Dwek in connection with that matter. I, it doesn't  
19 make sense that an party to a lawsuit calling and  
20 trying to find criminal counsel for one of their  
21 witnesses is not relevant or it doesn't have any  
22 bearing on the proceeding. Those are facts that the  
23 jury is entitled to learn when they weigh the evidence  
24 in this case. So we, we think the insider allegations  
25 are so scant, Your Honor, that we'd actually ask that

**Response - Pinkston****19**

1       this Court intervene and that the Trustee bring in  
2       just, just ten, the ten hottest documents and bring  
3       them into the Court and let Your Honor review then, and  
4       then we can have a serious discussion about, about the  
5       nature of the Trustee's allegations and whether he has  
6       a legitimate basis to back up his accusations of money  
7       laundering.

8               Mr. Dwek accused my clients of money  
9       laundering. The Trustee's has gone one step further in  
10      his latest pleading and actually accused my colleague,  
11      an attorney at my firm, of money laundering. That's  
12      something that not even Dwek was, was willing to say.  
13      They said he was a co-facilitator. We think that  
14      really means co-conspirator, but they're, they're  
15      wordsmithing so, so they're not actually accusing  
16      someone of criminal wrongdoing. It's inappropriate and  
17      without, without an investigation, without evidence to  
18      back it up that is not something that should ever be  
19      put in a pleading and brought before this Court.

20             On, on the, on the point of Mr. Dwek's  
21      credibility, I mentioned that Mr. Rosenberg has come  
22      forward and disputed what Mr. Dwek put in his  
23      affidavit. I noted Your Honor's decision in which you  
24      found that Mr. Dwek negated virtually every verified  
25      allegation in the complaint. We suspect, and we

**Response - Pinkston/Finger****20**

1 suspect that there are more instances where Mr. Dwek  
2 has lied or misled the Trustee. And those go to the,  
3 the heart of not only his character but to the heart of  
4 the strength and the merit of the Trustee's allegations  
5 in this case. We're entitled to, to look at those  
6 communications and those documents to, and compare that  
7 to what's on record or what was testified at the 81  
8 Section 341 meetings to see ways in which Mr. Dwek has  
9 misled or lied to the Trustee in other instances and  
10 what the Trustee's response to that was.

11 It, it can't be the case that the Trustee in  
12 his investigation learns that Mr. Dwek is repeatedly  
13 lying to him and does nothing about it and that doesn't  
14 have some bearing on Mr. Dwek's truthfulness or the  
15 Trustee's credibility when they testified to a jury in  
16 this case.

17 Unless Your Honor has a question I think  
18 that's all I have.

19 THE COURT: No. Thank you.

20 MR. PINKSTON: Thank you.

21 THE COURT: Anything else, Mr. Finger?

22 MR. FINGER: Yes, Your Honor, thank you.

23 The Defendants have asked for very particular  
24 grounds for relief, okay, and I would ask the Court to  
25 hold them to that. These other things that Mr.

**Response - Finger****21**

1 Pinkston brought up today for the first time that I've  
2 heard of about some letter to Judge Linares or some  
3 other calling around for counsel is, for all I know  
4 it's fabricated. But it's not necessarily implicated  
5 in the grounds for relief that, that are the subject of  
6 this motion. So there are some other inaccuracies too,  
7 that I need to correct.

8 It is beyond dispute Mr. Dwek is not the  
9 Trustee's client. That is not the basis for, for the  
10 establishment of an attorney/client privilege. He is  
11 the former agent of 80 debtor entities that are the  
12 subject of these bankruptcy estates that the Trustee is  
13 administering, and that's the basis for that, for that.  
14 It's not, it is not the basis of a relationship where  
15 Solomon Dwek, an individual, is a client and Mr.  
16 Stanziale is a lawyer.

17 Also, the issue about Mr. Rosenberg stating  
18 that he doesn't know Mr. Cayre, there are documents in  
19 this production, indeed they're cited in the response  
20 to the discovery requests about the insider status,  
21 that are letters from Mr. Rosenberg to Mr. Cayre. So  
22 that is demonstrably false by the evidence that are in  
23 the Trustee's production. Those same documents are the  
24 ones that Mr. Pinkston doesn't need the Court to do  
25 anything.

**Response - Finger****22**

1           In response 17 he's got all the documents  
2           that relate to this. Never mind the fact that Mr. Dwek  
3           is married to a woman who's aunt is Mr. Cayre's wife.  
4           And that's just an undisputed fact. We can argue the  
5           legal ramifications of that relationship, but that is  
6           nonetheless a fact. These -- so the Court need not  
7           intervene with respect to insider sales because those  
8           documents are, have been produced and are cited in the  
9           record.

10           And finally, Your Honor, the talk of Mr.  
11           Dwek's credibility certainly that's going to be at  
12           issue here, but the fact of certain expenses being paid  
13           have nothing to do with his credibility here. In  
14           reality, this case rises and falls on the documents  
15           that are created. And frankly, Mr. Cayre's explanation  
16           for those documents, if and when he ever gets in the  
17           witness chair, and this, this discovery (indiscernible)  
18           really is simply delaying the, the inevitable, which is  
19           depositions in this case, which are going to illuminate  
20           a lot of these issues. And, and frankly, from the  
21           Trustee's perspective, the sooner we get to that the  
22           better off everyone is in terms of prosecuting this  
23           case.

24           Unless there are questions.

25           THE COURT: No. Thank you.

**Response - Pinkston****23**

1                   MR. PINKSTON: Just a, just a few follow-ups,  
2                   Your Honor.

3                   I'd like to direct Your Honor to page 16 of,  
4                   carries memorandum of law for a discussion about  
5                   Dwek's, a request the Trustee immediately produce all  
6                   communications and documentation regarding Dwek's  
7                   recent arrest; revocation of Dwek's bail in connection  
8                   with his alleged theft of a car; lying to the FBI and  
9                   filing a false affidavit; the Trustee's letter to Judge  
10                  Linares of the district court regarding the foregoing;  
11                  and, the Trustee's and/or his professionals recent  
12                  efforts to secure a criminal defense counsel for Dwek.  
13                  So to say that we haven't asked for those things that  
14                  are now before the Court is absurd, Your Honor, page 16  
15                  of the memorandum of law.

16                  The next, the next point I want to make, Your  
17                  Honor, is that we have reason to believe, and we cited  
18                  it in our briefing on this issue that Mr. Stanziale  
19                  has, has informed the FBI that he thinks Dwek is a  
20                  pathological liar. I, I can't think of anything else  
21                  that's more relevant than a plaintiff calling his star  
22                  witness a pathological liar. That's something the jury  
23                  is entitled to hear and something we plan to, to  
24                  present to the jury at trial. Note in the Trustee's  
25                  response he, he coyly responds that he has no document

**Response - Pinkston****24**

1 reflecting such communications. He doesn't deny that  
2 he made the statement. And he can answer, he can  
3 answer those questions.

4 We believe, or we have reason to believe that  
5 there are gonna be other instances where the Trustee  
6 questioned Dwek's credibility in his communications  
7 with the Debtor. For example, Mr., Mr. Dwek submits an  
8 expense receipt and the Trustee sends back an E-mail  
9 that says, you know, these are hypothetical, Your  
10 Honor, it says, "This charge doesn't look right. I'm  
11 not exactly sure," and then come to find out it wasn't  
12 a legitimate charge. That's something that bears on  
13 both men's credibility and it's something that there's  
14 no reason to exclude it in discovery.

15 Maybe, maybe it is or isn't relevant at  
16 trial. Maybe it is or is not admissible and something  
17 that the jury gets to hear, but that's not Your  
18 Honor's, that's not the question before Your Honor  
19 today. The question is: Are we entitled to those  
20 communications?

21 There's, there's no reason, there's no basis  
22 in law to find that an attorney/client privilege exists  
23 here. We can say that Mr., Mr. Dwek was the agent of  
24 the corporation, but we all know that's not true. He  
25 wasn't operating legitimate businesses. In fact, the



**Response - Finger/Decision****25**

1 Trustee has already conceded that these were all Mr.  
2 Dwek's alter egos when he substantively consolidated  
3 the estates before your court. Now, he wants to take  
4 the other position these were all different businesses,  
5 none of it has anything to do with this case. Your  
6 Honor, it's simply, it's, it's too convenient to the  
7 Trustee's case to hold water.

8 THE COURT: Anything else? Thank you.

9 MR. FINGER: Your Honor, (indiscernible)  
10 these were real entities with real assets that have  
11 produced real sales (indiscernible). So these  
12 (indiscernible) entities are not (indiscernible)  
13 somehow fictional is simply false. That there are,  
14 they are entities that held assets (indiscernible)  
15 dealt with and dealt with his former agent on that.

16 THE COURT: Okay. Defendants Ken Cayre, KLCC  
17 Investments, LLC and KLC Foundation are moving to  
18 compel the Trustee to respond to their discovery  
19 requests. The Trustee filed certifications and a brief  
20 in opposition on November 22nd and the Cayre Defendants  
21 filed a response on November 25th.

22 The Court will first address the threshold  
23 issue of relevancy. R.26(b)(1) provides that,

24 "Parties may obtain discovery regarding  
25 any non-privileged matter that is relevant to

## Decision

26

1 any party's claim or defense."

2 Courts have noted that,

3 "The precise boundaries of the R.26  
4 relevance standard depend upon the context of  
5 each particular action and determination of  
6 relevance is within the Court's discretion."

7 That's from Graco v PMC Global, 2011 W.L.

8 1114233.

9 The context of this particular action is  
10 crucial to the determination of relevance. The Trustee  
11 has admitted that in deciding to file this and other  
12 adversary complaints he relied heavily on information  
13 obtained from Solomon Dwek. The Trustee has stated  
14 numerous times that such reliance was necessary because  
15 much of the Debtor's financial information was not  
16 written down.

17 In opposition to this motion the Trustee  
18 states that,

19 "Unraveling this colossal mess  
20 necessarily required the assistance its chief  
21 creator, Solomon Dwek."

22 This was the rationale proffered to the Court  
23 to justify paying Mr. Dwek with estate funds.

24 So given that background it is difficult for  
25 the Court to understand the Trustee's argument that

**Decision****27**

1       communications between Solomon Dwek and the Trustee and  
2       his professionals are not relevant. The Court is well  
3       aware that this is only one of hundreds of adversary  
4       complaints that were filed in these bankruptcy cases  
5       and that many of the E-mails will relate to general  
6       administrative matters as well; but, that does not mean  
7       that all communications should be shielded from  
8       discovery. And contrary to the Trustee's position,  
9       post petition communications are also relevant.

10               The Trustee's decision to file this adversary  
11       complaint, his decision to oppose summary judgment and  
12       to continue to litigate this case are all based, at  
13       least in part, on information being fed to him from  
14       Solomon Dwek. That makes these post petition  
15       communications relevant. And it makes the statement  
16       that the case will rise or fall on the documents seem  
17       almost incomprehensible in the context of positions the  
18       Trustee has taken throughout the case.

19               "It needs to be borne in mind that  
20       courts have construed R.26 liberally creating  
21       a broad range for discovery which would  
22       encompass any matter that bears on or that  
23       reasonably could lead to other matters that  
24       could bear on any issue that is or may be in  
25       the case."

**Decision****28**

1 And that's from Jones v DeRosa, 238 F.R.D.  
2 157.

3 The requested information certainly meets  
4 that liberal standard. The Court also wants to note  
5 that how broadly or narrowly the Trustee construes the  
6 discovery rules changes as suits him. Just last week  
7 the Trustee's counsel was arguing that requesting 15  
8 years worth of discovery from a non-party, that is  
9 Chasky Rosenberg, was defensible. When wearing that  
10 hat, the Trustee's counsel stated,

11 "Given the broad scope of the discovery  
12 rules the Trustee respectfully submits that  
13 at this stage tangential evidence relevance  
14 is all that is required."

15 See Hite v Peters, 2009 W.L. 1748860, which  
16 holds that,

17 "Relevancy is more broadly and liberally  
18 construed at the discovery stage than at  
19 trial."

20 Well, the same is true now that the Trustee  
21 is on the other side of a motion to compel.  
22 Accordingly, the Court finds that the requested  
23 information meets the relevance threshold.

24 The next issue is whether even if relevant  
25 the information should be shielded from disclosure

**Decision****29**

1 based on attorney/client privilege or the work product  
2 doctrine. The Court is amazed that the Trustee can  
3 make this argument with a straight face. Throughout  
4 this bankruptcy case Solomon Dwek has been represented  
5 by Tim Neumann. At no point prior to this motion has  
6 there been any suggestion that Charles Stanziale  
7 represented Solomon Dwek. It would seem fairly obvious  
8 that such representation would violate the rules of  
9 professional conduct because the interests of the  
10 estate are frequently at direct odds with the interests  
11 of Mr. Dwek.

12 That issue was explored by the bankruptcy  
13 court in In Re: Swanland, LLC, 2007 W.L. 4146680,  
14 which explained,

15 "The role of a Chapter 11 trustee is to  
16 act as a representative of the debtor's  
17 bankruptcy estate not as representative of  
18 the debtor. Any attorney for the trustee  
19 that might be appointed in these cases would  
20 represent the trustee and would not represent  
21 the debtors. The fact that a debtor-in-  
22 possession performs the duties of a trustee  
23 pursuant to 11 U.S.C. Section 1107(a) and  
24 1108 means little in the case of appointment  
25 of a Chapter 11 trustee where the debtor-in-

**Decision****30**

1 possession has not been properly performing  
2 those duties and is thus relieved of them.

3 "When a Chapter 11 trustee is appointed the  
4 trustee and the debtor are not the same  
5 party, nor do they necessarily share the same  
6 interests. In fact, the interests of a  
7 Chapter 11 trustee and debtors are often in  
8 opposition. In such a case, if a conflict  
9 were to arise, the appointed Chapter 11  
10 trustee's loyalties are to the estate even if  
11 they are in direct conflict with the wishes  
12 of the debtor further establishing the need  
13 for a separate counsel for the debtors."

14 And that's all a quote from that case.

15 That's a clear, that clear distinction  
16 between the role of the trustee and the role of the  
17 debtor is not obviated in this case because Mr.  
18 Stanziale felt he needed Solomon Dwek's assistance.  
19 The bankruptcy code itself provides at Section 521(3)  
20 that,

21 "If a trustee is serving in the case the  
22 debtor shall cooperate with the trustee as  
23 necessary to enable the trustee to perform  
24 the trustee's duties under this title."

25 The cases that the Trustee cites in support

## Decision

31

1 of the notion that he may assert the attorney/client  
2 privilege are thoroughly unpersuasive. The Trustee  
3 cites to Commodity Futures Trading Commission v  
4 Weintraub, 471 U.S. 343, in which the Supreme Court  
5 held that,

6 "A corporate debtor's attorney/client  
7 privilege with respect to pre-petition  
8 communication vests in the trustee upon his  
9 appointment."

10 But that is a vastly different issue than  
11 whether the post petition communications Charles  
12 Stanziale and his professionals had with Solomon Dwek  
13 are protected by the attorney/client privilege.

14 The primary case relied upon by the Trustee  
15 is Vieira v AGM II, L.L.C., or In Re: Worldwide  
16 Wholesale Lumber, 392 B.R. 197. The Vieira court found  
17 that,

18 "A trustee's right to assert the  
19 attorney/client privilege as to post petition  
20 communications is a logical extension of the  
21 Supreme Court's holding in Weintraub."

22 The Court fails to see that logic.

23 "The pre-petition privilege is an asset  
24 of the estate so that it makes sense that it  
25 should be under the control of the Trustee.

## Decision

32

1 But post petition communications should  
2 follow the normal rules of privilege, and  
3 chief among them is that the asserted holder  
4 of the privilege is or sought to become a  
5 client."

6 And you can see Vermoni v Novanet Health,  
7 259 F.3d 284.

8 It is that very basic piece that's missing  
9 here. Also, even if this Court agreed with the  
10 reasoning in Vieira its holding is much more limited  
11 than the Trustee suggests. In a footnote the Vieira  
12 court states,

13 "The communications between Stadleman  
14 and counsel for the Trustee regarding  
15 Stadleman's post petition conduct and  
16 knowledge he acquired when he was no longer  
17 acting in the capacity of officer or director  
18 of the debtor would not appear to be covered  
19 by the attorney/client privilege."

20 And that's from the Vieira case at page 203  
21 at note 6.

22 Here, the Debtor stopped acting in the  
23 capacity of an officer or director of any of the  
24 corporate debtors when the Chapter 11 Trustee was  
25 appointed. So virtually all of the communications at



**Decision****33**

1 issue here would not be covered by the attorney/client  
2 privilege. The Trustee's attempt to shield this  
3 information on the basis of attorney/client privilege  
4 is baseless. Mr. Dwek is a witness. He is not a  
5 client. He is not an agent. The Trustee's client is  
6 the estate.

7 The motion is granted. The Court finds that  
8 the information sought is relevant and that the  
9 attorney/client privilege and work product doctrine do  
10 not shield from disclosure communications between the  
11 Trustee and his professionals and Mr. Dwek and his  
12 professionals.

13 Thank you, Counsel.

14 MR. BARREIRO: Thank you, Your Honor.

15 MR. PINKSTON: Thank you, Your Honor.

16 MR. BARREIRO: One matter of housekeeping,  
17 Your Honor. We have a December 1st discovery end. I  
18 know that we're going to be getting all these documents  
19 and we had submitted a letter asking for an extension  
20 of that jointly through the end of March I thought. We  
21 have a conference December 20th I think --

22 THE COURT: Okay.

23 MR. BARREIRO: -- where Your Honor's clerk  
24 indicated we'd be talking about. But given that we're  
25 going to be getting these documents and then there's

**Decision**

**34**

1       some more motions I think on the next calendar we were  
2       hoping to do depositions in this case end of January,  
3       February and March. But if we have this December 1st  
4       deadline we're sort of all in a pickle. So I wanted to  
5       bring that --

6               THE COURT: We're not going to extend this  
7       till March.

8               MR. BARREIRO: Okay.

9               THE COURT: This case has been going on for a  
10       long, long time. I mean obviously, I'm not going to  
11       hold anybody to a December 1st deadline, but you need  
12       to reset your sights.

13              MR. BARREIRO: Okay.

14              THE COURT: Can I help you? Did you have  
15       anything to add?

16              MR. FINGER: No, Your Honor. We had  
17       submitted the letter that, that was referred to so.

18              THE COURT: Okay. All right. We'll have a  
19       further discussion on the 20th, but I want you to think  
20       a little bit more conservatively about what kind of,  
21       what kind of extension I'm going to be willing to  
22       grant. Okay.

23              MR. BARREIRO: Okay. Thank you, Your Honor.

24              MR. FINGER: Thank you, Your Honor.

25              THE COURT: All right. Thank you.

**Decision**

**35**

1 (Recording off 2:53:52 - on at 2:53:56)

2 MR. FINGER: Is the Court going to enter the  
3 order or is it going to be circulated and submitted to  
4 the Court?

5 THE COURT: We, we got an order from you,  
6 didn't we?

7 MR. FINGER: We, we did submit an order.

8 THE COURT: I think we'll probably just enter  
9 that order.

10 MR. FINGER: May I ask the Court's indulgence  
11 of forestalling the entry of that order pending a  
12 decision whether to, to appeal the bases because it's  
13 an issue of privilege. It involves, it is the basis  
14 for an interlocutory appeal. And I don't, I'm not  
15 telling the Court that I'm going to file a Notice of  
16 Appeal, but --

17 THE COURT: You can file it or not, but you  
18 have 14 days. Why do I -- from the entry of the order.  
19 Why would I delay the entry of the order just so that  
20 you can consider an appeal?

21 MR. FINGER: I don't want to be in that  
22 period of time held in contempt of an order that says  
23 any --

24 THE COURT: Okay. I will assure you I will  
25 not hold you in contempt of that order during the

1 appeal period.

2 MR. FINGER: Thank you, Your Honor.

3 THE COURT: Okay.

4 (Adjourned 2:54 p.m.)

**I N D E X**

Motion by Mr. Finger	5
Response by Mr. Pinkston	11/23
Response by Mr. Finger	20/25
The Court: Decision	5/25

CERTIFICATION:

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Isabel E. Cole  
Isabel E. Cole  
COLE TRANSCRIPTION, L.L.C.

Dated: December 1, 2011